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## Introduction

Daniela Berti, Gilles Tarabout, Raphaël Voix

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## Introduction

Daniela Berti [CNRS, Centre for Himalayan Studies (CNRS)]

Gilles Tarabout [CNRS, Center for Ethnology and Comparative Sociology (CNRS-University Paris West)]

Raphaël Voix [CNRS, Centre for South-Asian Studies (CNRS-EHESS)]

The Indian Constitution posits a separation between a secular domain regulated by the state and a religious domain in which it must not interfere. However, defining the difference between the two has proved difficult. Moreover, the state is directly and increasingly involved in various ways in the direct administration of many religious institutions. Given that the legal status of Hindu idols is recognized, deities may sue or be sued; and the courts are frequently asked to decide on various rights linked to religious functions and bodies. Such decisions often have a far-reaching impact on rituals and on religious specialists, and contribute to (re)defining religious categories and practices. The present volume aims at exploring this judicial activity in the specific case of Hinduism.

The provisions of the Constitution and of legislation provide a general framework for judicial action, with the latter proving decisive in managing the tension that arises between the secularist ideal and actual situations. It is our view that the courts' apparently 'technical', legalistic action actually shapes the place religion occupies in Indian and Nepalese society, perhaps even more so than the ideology of any political party. Even so, as the cases studied here demonstrate, the /p. xvi/ action of the courts needs to be analyzed beyond the rulings themselves or the relevant legislation. The arguments, the vocabulary in which they are couched, the legal strategies used by the parties and by the court, the pressure from society, the social and political stakes involved in the decisions, are all crucial elements that have to be taken into account.

Thus, this volume is about how courts deal *in practice* with Hinduism. Although such practices go unnoticed (except for a few over-mediatized cases), even though they are commonplace, they are fundamental to an understanding of the changes that Hinduism is undergoing in India and in Nepal. Our approach is therefore resolutely historical and anthropological and relies on detailed ethnographic descriptions as well as, in some cases, on archival research.

## Law and Religion in Secular States

Although the politics of secularism in India and in Nepal presents features of its own, many issues encountered are also common to secular states throughout the world, which contribute to varying degrees to supporting religions (Fox 2006; Kirsch and Turner 2009; Jensen 2011; Hosen and Mohr 2011). Even in the U.S.A, which Fox's study identifies as the country where the separation of state and religion is most fully implemented (according to his definition, this means no state support for religion and no state restrictions on religion), the involvement of courts in religious matters and the weight of religion in court proceedings is regular, widespread, and seemingly on the increase (Jurinski 2004; Hitchcock 2004; Nanda 2007; Bornstein and Miller 2009). Generally speaking, according to Jurinski (2004: 3), the involvement of courts 'in the private matters of religion' is almost inevitable, so that 'by necessity, the courts have become arbiters of what kinds of restrictions the government can impose on religious practice, and what role religion will play in public life.' Moreover, as Jurinski (2004: 6) remarks, 'issues are not always clearly secular or religious. Because of this overlap, it is impossible to completely separate religion and politics.'

From an anthropological point of view, the unavoidable involvement of the state and the courts in managing religious issues stems /p. xvii/ from the very arbitrariness of the category 'religion' and from the fact that it is partly a production of the law itself:

[T]he literature in the anthropology of religion has queried not only how to define religion but also whether religion can be defined at all and whether, as an object, it is a product of the modern state. Insofar as there is some truth to the latter [...], religion is, in part, constituted by means of law, but simultaneously as something that is constituted to stand at arm's length from the law. (Lambek 2013: 1)

From a similar perspective, Turner and Kirsch (2009: 9) underline that there exist 'permutations of order' between legal and religious normativities which 'in part result from the fact that [...] "legal" and "religious" realms are relational to—and in certain cases even constitutive of—each other.'

Law and religion, as well as secularism, are relational concepts (Asad 2003: 25; Sinha 2011: 4). The authors of the present volume use these concepts as they are contextually used by the actors directly concerned.<sup>1</sup> The fact that India is a constitutionally secular state, or that Nepal is drew up a constitution<sup>2</sup> with provisions for secularism, is significant in terms of conceptions of nationhood and of the political order, inasmuch as 'the law of the land determines the scope of religion in society; it is not religion that determines the scope of the law' (Mahmood 2006: 756, writing about India). It therefore befalls the law, and more specifically the courts, to define *what religion is*. They do this mainly by tracing the boundary between what is 'essential' in religion—the state should not interfere in it—and what is not 'essential' and therefore amenable to legal action (see Das Acevedo, Chapter 4; Tarabout, Chapter 1; Voix, Chapter 6—this volume). Indeed, if we are to follow Agrama (2010, 2011), this is a principle of sovereignty in all secular states: the discourse on secularism constantly blurs the distinction it claims to establish between a religious domain and a secular one, and the management of this essential indeterminacy that /p. xviii/ it thus produces is at the very root of the state's power as a 'secular' political entity.

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<sup>1</sup> As Gellner (2001) points out, the fact that 'secularism' is contextually defined and strategically used does not preclude the possibility of developing studies from a comparative perspective.

<sup>2</sup> The Constitution of Nepal came into effect on 20 September 2015.

While secularism is a recent choice in Nepal, it has ancient roots in precolonial and colonial India.<sup>3</sup> Though the State of India was termed a ‘secular’ nation only in 1976 through a constitutional amendment passed during the Emergency, the general framework for today’s Indian secularism had already been established in the Constitution of 1950 (Bhagwati 2005). Omission of the term ‘secular’, at the time, was deliberate and reflected controversies within the Constituent Assembly in a debate that has not lost any of its relevance today. These controversies have produced what, according to Keddie (2003: 28), is ‘perhaps the world’s largest contemporary body of publications debating the merits of secularism.’ There is no scope here for discussing this abundant literature as our perspective has a more restricted focus and specifically bears on the actual contribution of the courts in the shaping of Hinduism.<sup>4</sup> Let us merely point out that underlying much of this debate is a preoccupation about what some allege to be radical and irredeemable heterogeneity between a secular polity, and Indian culture and society. The way the debate in India has been specifically couched in *cultural* terms needs to be underlined.<sup>5</sup>

Considerable scholarship has been devoted to cultural aspects of law in India, mostly in terms of plural legalism.<sup>6</sup> This corresponds to /p. xix/ a well-established preoccupation, exemplified by the pioneering work of H. Maine (1861) in the second half of the nineteenth century, as well as to a current focus on different normative orders by scholars working on post-colonial societies. Anthropological approaches have highlighted the tactical possibilities that such legal plurality offers (Srinivas 1964, 1966; Cohn 1987; Galanter 1989). However, the understanding of the situation is sometimes expressed in terms of a conflict, as is often the case in many discussions on secularism:

In attempting to introduce British procedural law into Indian courts the British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; and the Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them. (Cohn 1987: 569)<sup>7</sup>

This emphasis on the contradictions and oppositions between an ‘alien’ state and an ‘indigenous’ custom has been critically discussed by Anderson (1990), who points out the fact that these studies focus on cultural differences to the detriment of an understanding of ‘how the structural distribution of political authority is related to processes of production and social

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<sup>3</sup> See for instance Mudaliar (1974), Appadurai (1981), Presler (1987), Chatterjee (2011).

<sup>4</sup> To mention but a few: Smith (1963), Derrett (1968), Bhargava (1998, 2010), Larson (2001), Jha (2002), Jacobsohn (2003), Basu (2003), Baird (2005), Parikh (2005), John (2006), Mahmood (2006), Nanda (2007), Needham and Rajan (2007), Sen (2007, 2010), Thapar (2007), Tejani (2008), Jaffrelot and Mohammad-Arif (2012).

<sup>5</sup> For a Marxist criticism of this current widespread culturalism, see Desai (1999).

<sup>6</sup> Since Maine’s essay on Hindu law, and apart from the monumental multivolume *History of Dharmashastra* by P.V. Kane (1968-77), there has been extensive scholarship focusing on the various sources of the law, for example how Indian ‘traditional’ law included Sanskrit-based Hindu law, Islamic legal systems, as well as ‘customary’ law that prevails at local level, and how this multi-layered system interacts with state law (Kane 1950; Derrett 1957; Galanter 1989; Lariviere 1989; Menski 2003; Lubin, Davis and Krishnan 2010). See also Eberhard and Gupta (2005), Baird (2005); and for a comparative historical perspective, Benton (2002).

<sup>7</sup> While Galanter (1989) shares with Cohn the opinion that the official system is foreign in origin and provides new opportunities for pursuing ‘traditional norms or concerns’, he and Baxi also underline the sometimes paradoxical interactions taking place between official regulations and ‘non-governmental controls of social life’ in the emergence of distinctively modern legal institutions (Galanter and Baxi 1979). However, Fuller (1988) criticizes some of the discontinuities that Galanter (and other authors) highlights, and in particular ‘his description of modern Indian law as “notoriously incongruent” with indigenous “attitudes and concerns”’ (p.226), and points to ‘the continuities and ultimately indigenous character of the law of religion in modern India’ (p.248). Other studies have shown that the everyday practice of justice-making is often informed by the pragmatic combination of older and newer legal procedures (Moore 1993; Holden 2008).

reproduction.’<sup>8</sup> This perspective has been /p. xx/ developed by historians in a few key studies where justice and the subject of law are no longer a question of legal juxtaposition or hybridity, but are studied as elements of social and political interaction.<sup>9</sup> As Bowles (2010: 61-2) argues,

Over the last couple of decades, it has become fashionable in some quarters to attribute the apparent rise of communal discord in colonial and post-colonial South Asia to the imposition on India of a “modern secularist” ideology imported from the West. This foreign imposition, we are told, has undermined the conditions that enabled Indians associated with different religious and social identities to live side by side in relative harmony—conditions sometimes referred to as provided by something like (to paraphrase) a “tradition of Indian tolerance rooted in its composite culture”. To be sure, the claim has not escaped criticism. Javed Alam, for example, has noted the implicit reification of “tradition” in such arguments, and has teased out a number of ways in which “tolerance” and “composite culture” might be construed to operate in South Asia.<sup>10</sup> However, there are a number of problems with both the pro- and anti-secularist camps in this debate. First, each has a tendency to assume a precolonial context of communal harmony. Second, once this assumption has been made and then explained through such concepts as India’s “tradition of tolerance”, or “India’s composite culture”, little historical evidence is presented to demonstrate how such cultural forms worked in practice in their historical settings. And third, the role of governance is largely overlooked, and responsibility for an apparent context of pre-colonial “communal harmony” is placed at the feet of a “grass roots” tradition.

### Courts and the Management of Hinduism

The present volume aims at contributing to a study of the role of governance in the management of Hinduism within a secular /p. xxi/ framework, through the vantage point of judicial activity. As in other secular countries, managing religion presents a few common characteristics. One is the separation made between a private and a public domain, a preliminary for the possibility of distinguishing secular issues from religious ones. In India, as a former Chief Justice underlines, ‘the Constitution makers [...] placed the individual at the centre of the Constitutional scheme’ (Bhagwati 2005: 40) and, indeed, the Preamble itself assures all *citizens* (i.e. individuals) the ‘LIBERTY of thought, expression, belief, faith and worship’<sup>11</sup> (emphasis as per original). Religion, according to this legal framework, is not to be seen as a set of practices and representations of power entangled in politics as is arguably the case from an anthropological and historical perspective, but as a separate domain. It is a matter of personal conscience and practice<sup>12</sup> which is protected—but not interfered with—by the state.

A second feature, a logical corollary of the first, is that individual religious freedom is subject to public order, health and, often, ‘morality’.<sup>13</sup> In India, this is made explicit by

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<sup>8</sup> In the words of Bêteille (1994: 561), if ‘secularism is an ideology, then secularization is not the outcome of that ideology alone, but also of a variety of material forces.’ See also Selvam (1997), Kaviraj (2000), Good (2001).

<sup>9</sup> For instance Mani (1998), Singha (1998), Mukhopadhyay (2006). As Singha (1998: xi) remarks, ‘these studies have undermined simple polarities between the “traditional” and the “modern” or the “introduced”.’ In a similar vein, Mani (1998: 5) argues that ‘the complexity and heterogeneity of both colonial and indigenous discourse underscore the serious limitations of theorizing the colonial encounter solely in terms of a self/other binary.’

<sup>10</sup> Javed Alam, ‘Tradition in India under Interpretive Stress: Interrogating its Claims’, in *Thesis Eleven*, No.39 (1994), pp.19–38, quoted in Bowles (2010: 61).

<sup>11</sup> The constitutional protection is extended by Art. 25(1) to ‘all persons’ who are thereby declared to be ‘equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion’.

<sup>12</sup> This is precisely what Warriar (2003) considers being at the heart of the secularization process.

<sup>13</sup> For instance, Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that ‘everyone has the right to freedom of thought, conscience and religion [...]. Freedom to

Article 25 of the Constitution, in which the freedom of conscience of all persons and their right to ‘freely profess, practise and propagare religion’ is ‘subject to public order, morality and health’; moreover, this freedom is also subject to the state’s responsibility in ‘providing social welfare and reform’, as well as to its duty in ensuring a rational management of resources and activities deemed secular but ‘associated with religious practice’.

The third feature is the role delegated to the courts to implement the constitutional principle of secularism. Indeed, though the Indian /p. xxii/ Constitution establishes both personal freedom of religion and the state’s right and duty to manage the secular, it does not define what is religious and what is secular: it is left to the courts to trace an ever-shifting border between the two domains through their successive decisions. Given the importance of religion in Indian society, the stakes here are particularly high. Indian Supreme Court and High Court Judges have been exceptionally active, if not proactive, in this regard in a variety of cases and procedures, appearing as supreme authorities over political and administrative institutions regarding religious issues. As Sen (2007: 6) writes:

As in any constitutional democracy, the Indian Supreme Court plays an important role in interpreting the Constitution. However, as in the United States, the line between interpretation of law and legislation often gets blurred in Supreme Court rulings. [...] This has meant that the Court not only plays an important adjudicatory role in a host of areas, but also actively intervenes and shapes public discourse. Judicial activism has affected religion as much as it has other diverse areas like the environment or federalism.

Commenting on Sen’s analysis, Baxi (2007) suggests distinguishing in the Indian Supreme Court’s decisions a ‘rights-oriented secularism’ from a ‘governance-oriented secularism’,<sup>14</sup> the latter testifying to a ‘high judicial power’ that ‘has acquired a “brooding omnipresence” that extends to ordinary legislation and even the exercise of executive powers.’<sup>15</sup> Indeed, as noted by Galanter (1971: 468-9), the scope of intervention by the courts in religious issues seems to be broader in India than in most other secular countries:

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Indian law permits application of different bodies of family law on religious lines; permits public laws, like those of religious trusts, to be differentiated according to religion; and permits protective or compensatory discrimination in favor of disadvantaged groups, and these may sometimes be determined in part by religion. The penal law in India is extraordinarily solicitous of religious sensibilities and undertakes to protect them from offense. The electoral law attempts to abolish religious appeals in campaigning. In all these areas courts must determine the nature and boundaries of a particular religion. But beyond this the state is empowered generally to use its broad regulative powers to bring about reforms in religious institutions and practices, and this power is wider in respect to Hinduism than it is in respect to other religions.<sup>16</sup>

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manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’

<sup>14</sup> Baxi (2007) defines rights-oriented secularism as a concern for ‘how to make the best complete sense of the normative proclamation of the right to freedom of conscience and to religious belief and practice’ (p.48), and governance-oriented secularism as the endeavour ‘to codify the limits of political practice that craftily appeal to religion as a resource for the acquisition, exercise and management of political power’ (p.49).

<sup>15</sup> The importance of courts of law seems to be on the increase and may be seen as part of a more general process of the judicialization of politics (Commaille, Dumoulin and Robert 2010). Concerning religion, see Turner and Kirsch (2009), Hitchcock (2004), Randeria (2007), Sezgin and Künkler (2014), Berti (Chapter 3, this volume).

<sup>16</sup> In this respect, Galanter (1971: 480) proposes to distinguish ‘two alternative modes for the exercise of the law’s “regulative oversight” of religious controls. We might call them the mode of limitation and the mode of intervention. By limitation I refer to the shaping of religion by promulgating public standards and by defining the field in which these secular public standards shall prevail, overruling conflicting assertions of religious authority.

There are different reasons why this power is conferred on the courts in India. One is that, in order to achieve a more egalitarian and progressive society, Article 25 of the Constitution places social reform above religious freedom. It enables judges to overrule traditions or decisions made by religious authorities, which could be seen as going against this commitment to social justice. With this goal in mind judges have, however, often developed a somewhat different argument, differentiating between practices deemed non-essential or even ‘superstitious’, which could be abrogated in the name of social progress, and others deemed essential for which they therefore reaffirmed the principle of non-interference.<sup>17</sup> /p. xxiv/ Thus, in practice, the mandate for furthering social reform and for managing the secular side of religious activities has not only been used to fight discrimination but has also been regularly invoked for de-legitimizing popular Hinduism and for promoting a text-based Sanskritic brand of Hinduism (Galanter 1971; Fuller 1988; Sen 2010).<sup>18</sup> This is in keeping with colonial courts which similarly aimed at ‘rationalizing’ religious practices and institutions, and sought authority in Sanskrit sources, first with the collaboration of Pandits and later by getting judges to claim to have a similar knowledge of the Brahmanical normative texts, the Dharmashastras (Rudolph and Rudolph 1965: 43). Supreme Court and High Court Judges do the same nowadays. Paradoxically, besides encouraging a progressive homogenization of Hinduism (Sen 2007: 5ff.),<sup>19</sup> which, in reality, is far from being acquired, they tend to act as an authority in religious matters, in the name of secularism, though not without some debate (Voix, Chapter 6, this volume).

Another reason for the judges’ intervention with respect to Hinduism is to be found in the latter’s multifarious structures of authority (Galanter 1971: 482):

The sprawling, disjointed, unorganized character of Hinduism and the parochialism of its spokesmen disqualifies it from a right to self-definition. Since it is so organizationally fragmented and diffuse, there are no religious leaders who have a mandate to define it for the entire religious community. To permit each religious dignitary to define it for himself would subvert any attempt at integration. Thus, in the absence of credible spokesmen, only the judges can speak to and for Hinduism as a whole. It is assumed that judicial intervention will have a salutary unifying as well as a reforming influence. Indeed, it is only when the /p. xxv/ state intervenes to promote unity and infuse modernity that it can create in Hinduism a capacity for self-definition.<sup>20</sup>

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By intervention I refer to something beyond this—to an attempt to grasp the levers of religious authority and to reformulate the religious tradition from within, as it were.’

<sup>17</sup> A recent example of this reasoning may be seen in a common judgment (for three petitions) by Himachal Pradesh High Court to abolish animal sacrifice in this state: *Ramesh Sharma vs. State of Himachal Pradesh and others*, CWP No. 9257 of 2011; *Mehar Singh and another vs. State of Himachal Pradesh and others*, CWP No. 4499 of 2012; *Sonali Purewal vs State of Himachal Pradesh and others*, CWP No. 5076 of 2012, decided on 26 September 2014.

<sup>18</sup> In Galanter’s words (1971: 482) this judicial activism is acceptable to the ‘educated reformist elite’ precisely because its members ‘are distressed by much of popular and traditional Hinduism which they feel lacks the dynamism, the concern for welfare and development that they feel is necessary for India’s progress. They are also distressed by its diffuse and fragmented character which in their eyes obstructs national unity and by its lack of coherence and organization which make the masses unavailable to mobilization for reform and development.’

<sup>19</sup> For some historical perspectives, see Frykenberg (1989).

<sup>20</sup> This observation was made more than forty years ago at a time when the Vishva Hindu Parishad had not yet gained the public importance it now enjoys. Despite the latter’s claims to speak in the name of Hindus, a claim not supported by all streams of Hinduism, the role of the courts in the legal—and therefore unifying—definition of Hinduism arguably remains as crucial as Galanter suggests.

The courts' active role in adjudicating on what Hinduism is, and on how it may be reformed, has been discussed by many scholars.<sup>21</sup> As Sen argued (2007: 6ff.), it has led to an ambiguous relationship with some of Hindutva's ideological assumptions: 'though the impetus for the court's rationalization and homogenization of religion has its origins in a liberal-democratic conception of secularism and the nation-state [...] there is a significant overlap between the judicial discourse and the ontology of Hindu nationalism.' In a later work, Sen (2010: 5ff., 10ff., 28ff) elaborates by pointing out a shift between an inclusivist vision of Hinduism, exemplified by Swami Vivekananda or Sarvepalli Radhakrishnan, and the exclusivist vision ascribed to some other Hindu reformers (for instance Dayananda Saraswati) and to Hindutva.<sup>22</sup> The inclusivist discourse, in terms of tolerance, /p. xxvi/ is sometimes equated with an inner Hindu disposition to a form of indigenous secularism; it may easily veer towards the affirmation of the universalistic nature of *dharma*, the socio-cosmic order of Brahmanism,<sup>23</sup> following a modern reinterpretation of this concept and excluding those who do not share this vision.<sup>24</sup> The courts, in the best of cases, have tended to follow the inclusivist line and have sometimes been perceived as favoring the Hindu majority over religious minorities.<sup>25</sup> In this volume, we regard them as sites of contention, where conflicting views of religion and secularism are constantly reenacted, with often changing, if not contradictory, rulings. As Basu (2003: 132) puts it, 'the legal realm is critical for the solidification of hegemonic norms while also being a primary site to challenge them.' Our purpose is to investigate some of these court debates as they shed decisive light on the ongoing transformations of Hinduism in Indian and Nepalese societies.

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Compared to the bulk of works on sources of law, on cultural differences, or on secularism generally in India, case studies on how courts actually deal with issues of secularism are few and far between. Moreover, most of them are related to a few highly

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<sup>21</sup> See for instance Smith (1963), Galanter (1971), Presler (1987), Fuller (1988), Sen (2007, 2010). This is not, however, unique to Indian courts: as a significant parallel, Warrier (2010: 270) mentions a UK judgment which, regarding a local case, proposed a general definition of Hinduism: 'Hinduism was a unified religion, monotheistic and with a central text as the basis for its belief and practice.'

<sup>22</sup> Such a shift is to be found in the successive uses of the definition of Hinduism as a 'way of life'. This expression was coined by Sarvepalli Radhakrishnan in 1926 (Sen 2010: 9) in order to underline a claim of intrinsic tolerance deemed proper to Hinduism. It later acquired a legal existence in 1966 in *Sastri Yagnapurushadji v. Muldas Bhundardas Vaishya*, 1966 AIR 1119: [1966] SCR (3) 242) when penned by a Supreme Court Judge, Justice Gajendragadkar, who was known for encouraging social reform (Galanter 1971). More recently, in the so-called 'Hindutva Judgments' of 1995, it became an argument for allowing a Bharatiya Janata Party (BJP) politician to invoke Hinduism in his electoral campaign—this was granted by considering Hindutva and Hinduism as a 'way of life', not as a 'religion' (Nauriya 1996).

<sup>23</sup> A striking example is *Rajesh vs Union* (WP 2 of 2011, Gujarat High Court, 10 February 2011). Gujarat High Court had to decide about a petition 'as to whether offering of prayers at "Foundation Laying Ceremony", called in popular language as "Bhoomi Pujan" for construction of new building could be said as non-secular activity.' After finding that secularism was based 'on the principles of 'Vasudeva Kutumbakam' [the cosmos is one family, cf. Hatcher 1994], the two judges concluded that 'if the basic human character for the interest of the mankind irrespective of its caste or community or religion are shown as the practices in any religion, such [...] can be said as a secular activity.' Therefore, since the prayer offered to the earth was for the well-being of all, it could not be termed a non-secular action.

<sup>24</sup> The supposedly characteristic 'tolerance' of Hinduism and the political consequences of this assumption have been critically discussed at length. See for instance, Hatcher (1994), Mallampalli (1995). For a genealogy of the construction of tolerance in Hinduism, see Halbfass (1988a), and for an analysis of the reinterpretation of *dharma* in modern Hinduism, Halbfass (1988b).

<sup>25</sup> The ambiguity and the *de facto* continuity between the inclusivist and exclusivist stances has been analyzed (using other terms) by many scholars. For Jacobssohn (2003: 55), 'secularism appears in the form of a radical majoritarianism in the service of an assimilationist agenda, in which those in power have been extended an implicit license to impose the norms and practices of the dominant culture on the rest of the society.' See also Khalidi (2008), Jayal (2013).



politicized cases, such as the *Shah Bano* case, legal disputes concerning Ayodhya, the ‘Hindutva judgments’.<sup>26</sup> This volume aims to complement these studies by taking into account less visible but equally relevant cases—in keeping with analyses by Galanter (1971), Fuller (1988) or Basu (2010).

Decisions of the Supreme Court and High Courts on secular/religious issues form an immense corpus of texts available for anthropological and historical studies. Specific cases may be recast in their social and political context, and they can often be studied in their judiciary story. Contemporary cases also allow for a courtroom ethnography or discussions with protagonists (judge, prosecutor, lawyer, parties), providing a rich social texture to facilitate their understanding. This contextual approach to selected, yet ‘ordinary’, cases reveals how courts, as social and political institutions, endeavour to shape secularism and religion today.<sup>27</sup> The question of evaluating how far this political and legal stand is connected to social realities has been raised.

Commenting on the *Yagnapurushadji* case,<sup>28</sup> Galanter (1971: 484) argued that some decisions may be seen as a discourse that is reserved for the elite ‘to reduce the dissonance of the elite—a dissonance which derives from their own ambivalence about Hinduism and about secularism’. He believed that there was the danger that ‘the lawyer’s fallacy that behavior corresponds to legal rules offers /p. xxviii/ powerful reinforcement of the elite’s fallacy that the masses are following them’ (ibid.). While not disputing the elitist character of judges and lawyers’ views, this appreciation nevertheless needs to be somewhat played down. As we have seen, the current legal order is not historically as ‘alien’ to society as some may affirm: it is the outcome of a complex and prolonged interplay of social and political factors. Indeed, the rule-oriented perspective of the courts may seem far removed from the relation-oriented discourse held by protagonists outside the courtroom, and the norms decided by the judges do not necessarily correspond to social practices or to widely shared perceptions. At the same time, local relations of power and behind-the-court compromises often determine the outcome of a trial. Moreover, as the following chapters show, judicial rulings provide a framework that imposes legal limits both for litigations to progress and for litigants to make use of legal norms in tactical arguments. Besides, while the judges’ opinion may not always be shared by ‘the masses’, it is nevertheless very often in keeping with a reformist agenda defended by various political organizations, whatever their leaning. In this sense, courts emerge as a locus where potential conflict between two alternative methods of reasoning - one based on social links, economic interests, sentiments, conflicts or loyalties, and the other on legal reasoning and judicial proceedings - is eventually negotiated. Judicial decisions about secular/religious issues provide an extremely rich and revealing vantage point for understanding not only how a normative order is elaborated, but also a fundamental aspect of the interaction between state and society.

## **Rationalizing Hinduism**

Our findings confirm and provide further examples of the state’s increasing control over religious endowments which has already been highlighted by most scholars and perhaps best summarized by Dhavan (2001: 315) by arguing that ‘the state manages such institutions

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<sup>26</sup> See *Mohd Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945; for the ‘Hindutva judgments’, see *Manohar Joshi v. Nitin Bhaurao Patil and Another*, AIR 1996 SC 796: (1996) 1 SCC 169; *Dr Ramesh Yeshwant Prabhoo v. Shri Prabhakar Kashinath Kunte*, AIR 1996 SC 1113: (1996) 1 SCC 130. The series of legal disputes concerning Ayodhya can be referred from <http://elegalix.allahabadhighcourt.in/elegalix/DisplayAyodhyaBenchLandingPage.do>, last accessed on 30 November 2015.

<sup>27</sup> For a detailed analysis of the Indian Supreme Court as a political institution, see Baxi (1979).

<sup>28</sup> *Sastri Yagnapurushadji v. Muldas Bhundardas Vaishya*, AIR 1966 SC 1119 : [1966] 3 SCR 242.

much better than those who have traditionally managed them’, an argument that had already been developed during the colonial period.<sup>29</sup> The /p. xxix/ state has taken over more and more temples since 1950 and has run them by setting up administrative boards; a move supported by the judiciary. As Dhavan writes, ‘What is happening is not the temporary intervention of regulatory control by the state. Religious endowments are being nationalized on an extensive scale.’ The growing intervention of the state’s executive and administrative branches has also led to a rise in the number of court cases and, in order to decide on the legality of a state’s contested action, judges have had to take decisions regarding what is secular (constitutionally open to state action) and what is not. While religion is said to permeate the whole of society, a secular domain is carved out by establishing the ‘essential practice’ doctrine: what is secular is what is not essential for a religion. As the following pages show, the extent of what is recognised as essential religious practices has been steadily shrinking.

Two main factors –which have already been alluded to– converge in the expansion of the ‘secular’ domain: The first factor is the constitutional mandate for social reform which is placed above religious freedom. As Justice Bhagwati underlined (2005: 43), framers of the Constitution ‘were aware that it was necessary to bring about social reforms with a view to lifting India out of medievalism, obscurantism, blind superstition and anti-social practices.’ Thus, ‘the secular State had to perform this historic function of confining religion to its essential sphere’ and ‘the Indian Constitution had, therefore, to accord to the state power to interfere with freedom of religion.’ (ibid.) In a way, judges never interfere in religion, solely in practices they deem to be superstitious: ‘even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion’ (Bhagwati 2005: 46).<sup>30</sup>

The second factor ensues as a direct result of the first. True religion is sifted from ‘superstition’ or unessential practices by referring to Sanskrit texts which are deemed authoritative for the whole of Hinduism—as was already the case during British rule. This process has been abundantly documented and finds further illustrations in the following pages. As Hüsken (this volume) shows, such a process of ‘textualization’ not only affects the legitimacy of rituals /p. xxx/ and the definition of what is essential to religion: it also has a direct bearing on identity mechanisms and on the production of social boundaries.

The development of this textual vision of religion has also encouraged the multiplication of education schemes for priests in various states (Fuller 1997), leading to profound changes in their training and sometimes in their recruitment. It also often gives special flavour to the rationale behind judgments and to the way they are drafted: in higher jurisdictions, judges frequently elaborate on religious and philosophical concepts, relying on a great variety of sources from Sanskrit texts to contemporary writers. Particular reference is made to the Vedas (and most specifically to the Upanishads) according to a modern ‘neo-Vedantic’ reading, even by judges reputed for their strong commitment to secularism.

As in other countries, religion may also be invoked in courts as a defense,<sup>31</sup> which leads to a paradox: in ‘religious cases’ religion may be deliberately avoided and not be mentioned at all to keep the trial on the ‘secular’ side, while judgments bearing on topics such as land taxes may include pages of religious speculation (Berti, Chapter 3, this volume). Although judicial requirements induce a formalized legalistic presentation of secular/religious issues in court, some issues may nonetheless be given religious overtones that sound at times like a tactical ploy (Halpérin, Chapter 10; Basu, Chapter 11 - this volume).

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<sup>29</sup> For Presler (1987), this process characterizes the ‘expansive “rational” state’.

<sup>30</sup> For a discussion of the use of ‘superstition’ as a political and reformist discourse in the Indian context, see Bharati (1970).

<sup>31</sup> For instance, attorneys in the USA increasingly tend to use Biblical references, both for prosecution and defense—see Bornstein and Miller (2009).

Courts have a multiple, intense and ambivalent relationship with religion. The ‘nationalization’ of religious endowments—generally supported by courts—and the expansion of the legal limits of the secular have to be seen within the framework of this peculiar relationship. Secularism in court practices may not actually ‘eliminate religion’ from the state. Instead, it may reside in the very process of subjecting a not-so-negligible part of religious life to the court’s legalistic proceedings, managerial vision, and eventually to a legal authority which is not religious in itself. At the same time, it cannot be denied that there is an objective convergence, as pointed out by many scholars, between secularism as practised by the courts and the /p. xxxi/ Hindu reformist agenda inherited from the Brahma Samaj and Arya Samaj (Kasturi, Chapter 8; Tarabout, Chapter 1 - this volume).

As Fuller (2003: 159) has underlined, the ‘Weberian rationalization’ advocated by the state through its various agencies (including the courts) leads to constant reform that establishes Hindu temples as ‘institutions central to the modern nationalist imagination.’ Building a strong nation while developing the ‘rule of law’ based on individual rights, is part of the courts’ agenda when dealing with issues of secularism. Though based on very different and sometimes opposite premises, some secular Judges and Hindu nationalists unwittingly share a similar perspective: the reform and unification of Hinduism will contribute to the unity and strength of the nation. However, as Galanter (1971: 484) remarked more than forty years ago, ‘this is not a self-evident proposition. Perhaps the disunity of Hinduism contributes to national unity. The successful breaking down of Hinduism’s capacity to generate and tolerate internal differences may well lessen India’s capacity to sustain pluralistic democracy.’

## **Organization of the volume**

The chapters of this volume portray a judiciary deeply involved in managing secularism in India and in Nepal, and which plays a crucial role in the governance of religion in the two countries. In India, being the highest authority in interpreting the Constitutional mandate, the Supreme Court has been particularly instrumental in delineating the scope of possible legal actions related to religious issues and in establishing the current legal framework for religious practice. We hope to show that an analysis of court decisions at different levels of the judiciary can bring a fresh understanding of long-term and interrelated religious and political developments.<sup>32</sup>

This volume is organized into four sections. Section I, ‘Secular Issues and Court Practice’, discusses the question of secularism as its contours are progressively defined by Indian and Nepalese courts. The study by Tarabout (Chapter 1) focuses on temple priesthood in Kerala where men born into non-Brahmanical castes have been appointed /p. xxxii/ priests to public Brahmanical temples with the approval of the court. The latter have defined priests as being mere employees, who should be recruited only on the basis of merit, not according to birth, an opinion that goes against the widely shared assumptions about caste requirements for this function. This legal stand, inspired by an ideal of equality and secularism that features in the Constitution, meets with the approval of most political parties, including Hindu nationalists (though their aim is rather different). However, in the cases studied by Tarabout, many non-Brahmanical incumbents appear to have completed a preliminary training course that ended with an initiation ceremony said to confer an acquired Brahmanhood. The so-called opening of the priesthood to various castes thus needs to be seen as the conjunction of reforms operated at state level in a secularist perspective, with reforms pursued by reformists or radical Hindu movements which encourage the Sanskritisation and Brahminisation of non-Brahmanical castes (Jaffrelot 2003: 459ff.). The author concludes, in line with Fuller (2003),

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<sup>32</sup> Unless specified, the references to the cases are to the respective page numbers from the journals and not the numbers of the paragraphs of the judgments.

that it leads to secular regulation of religion while the public sphere becomes increasingly religious.

Letizia's contribution (Chapter 2) on secularism and the judiciary in Nepal explores aspects of the state's recent commitment to a secular government (2007). The Maoists or ethnic and religious minorities' competing visions of secularism and a fear expressed by some Hindus that secularism amounts to an attack on Hinduism, make the elaboration of guidelines by the courts prone to controversy. By analyzing two court cases that began as Public Interest Litigations (PILs) - one concerning the rights of Kumaris,<sup>33</sup> the other the nomination of priests to the Pashupatinath temple<sup>34</sup> - the author shows how human rights have become arguments for interfering in a religious tradition, /p. xxxiii/ while secularism is interpreted as a principle of non-interference of the state in religious matters. The argument for a separation between state and religion goes both ways: advocates of secularism want the nation to no longer be a Hindu state, while others want to 'protect' religion from the state—a move that tends to define religion in restricted spiritual terms. Secularism, as it emerges from these cases, is not unlike the principles laid down in the Indian Constitution, where a general principle of non-interference combines with the right to intervene in the name of social reform. It has yet to be seen what kind of substance courts in Nepal will give to such principles.

In Section II, the three chapters deal more specifically with judicial debates about 'Gods' Affairs'. In her study on 'Plaintiff Deities' (Chapter 3), Berti analyzes how, in the name of their respective gods, two villages compete over ceremonial honours at the Dussehra festival in Kullu (Himachal Pradesh) and how the conflict shifts between different decision-making bodies. The 'traditional' ritual process involves the human mediums of the gods or/and the gods' palanquins, enabling what is constructed as direct verbal disputes and, at times, physical action between the two deities. Following repeated clashes between village supporters of the gods during the festival's main procession, the administration stepped in and the District Commissioner imposed a restriction on the movements of the palanquins and their bearers at the time of this procession. This prompted villagers to call for the intervention of a third party, the state High Court. One group filed a writ petition accusing the state administration of interfering in the free practice of religion. Berti analyses what this shift entails in the build-up of the dispute, as ritual consultation of the gods' will gives way to a bureaucratic or legalistic logic of decision-making, focusing on written documents and the production of legally admissible evidence. There is, however, nothing 'alien' in the court's logic with regard to the villagers, as the latter are eager to obtain official approval of their claims as part of their long-term infighting for prestige.

In Chapter 4, Das Acevedo discusses the role of the courts in the creation of new norms, thereafter legally said to be 'traditional', by comparing two judgments passed by the Kerala High Court (1991 and 2011).<sup>35</sup> The two cases revolve around the ban imposed on

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<sup>33</sup> *Pundevi Maharjan vs. Govt. of Nepal et al.* [2008 /2065 b.s.] 50/6 NKP 751.

<sup>34</sup> *Krisna Rajbhandari et al. vs Prime Minister and Patron of Pashupati Area Development Trust, Office of the Prime Minister and Council of Ministers et al.*, Writ Petition no. 0364/16 Poush 2065 b.s. (31 December 2008); *Barath Jangam vs. Prime Minister and Patron of Pashupati Area Development Trust, Office of the Prime Minister and Council of Ministers et al.*, Writ Petition no. 0365/16 Poush 2065 b.s. (31 December 2008); *Lok Dhoj Thapa and Binod Phunyal vs. Prime Minister and Patron of Pashupati Area Development Trust, Office of the Prime Minister and Council of Ministers et al.*, Writ Petition no. 0366, 16 Poush 2065 b.s. (31 December 2008).

<sup>35</sup> *S. Mahendran v. Secretary, Travancore Devaswom Board*, AIR 1993 Ker 42 ; 'Actor Jayamala Charged for Fake Sabarimala « Violation » Claim', *The Times of India*, Bangalore edition, 15 December 2010; 'Charges Against Jayamala Quashed', *The Hindu*, national edition, 13 April 2011; 'Controversy over Sabarimala Temple Entry Returns to Spotlight', *The Times of India*, Kochi edition, 14 October 2011.

fertile /p. xxxiv/ women, preventing them from visiting the temple of Sabarimala because its presiding deity, Ayyappan, is conceptualized as a strict ascetic. Opponents to the ban contested it on the grounds, *inter alia*, that this is not an essential part of Hinduism as it is not prescribed by any textual authority (understood as ancient Sanskrit texts). Nevertheless, the 1991 judgment upheld the ban. It developed a paradoxical legal construction of what a ‘prevailing custom’ is, basing its ruling on testimonies to how things should have been while rejecting those that stated how they actually were. The 2011 judgment confirmed this position, assuming that the ban had been ‘essential practice’ since time immemorial although it was only legally ascertained—in reality, created by the court itself—in 1991. Das Acevedo points out the paradox of this position: while the court ratified enforcement of the ban with reference to the doctrines of Hinduism, it actually created a new precedent that was made solely with reference to itself.<sup>36</sup>

Finally, Hüsken’s contribution (Chapter 5) concerns a religious dispute in Tamil Nadu that lasted for more than 140 years. It started as a contestation about the initiation of Vaikhānasas (a Viṣṇu uite tradition) to make them temple priests, which consists in their upper arms being branded by the head of the local Śrīvaiṣṇava community (another different Viṣṇu uite tradition). During the first stage of this conflict, priests questioned the legitimacy of Śrīvaiṣṇavas to supervise temple affairs and to do the branding, and tried to transfer the right to perform the initiation ceremony to one of their own family members. Later, by the early twentieth century Vaikhānasas were contesting the actual need for branding, producing as evidence in court their own ritual literature the printing of which had been recently developed as part of the community’s newly found self-assertion. This recourse to texts was in keeping with what colonial authorities and Hindu reformers considered to be the effective sources of true Hinduism. It enabled Vaikhānasas to redefine their relationships with /p. xxxv/ other religious groups in a process in which various actors concurred: the colonial state, the enlightened Hindu elite, Hindu reformers, as well as the active mobilization of the Vaikhānasas themselves who demonstrated their ability to make use of the tools relevant to a legal context in order to promote their own interests.

Section III, ‘Ascetics and the Law’, includes four chapters that focus on an important but rarely studied aspect of the courts’ intervention in religious issues: it concerns the regulation of distinct religious orders, *sampradayas*. Since British rule, there have been innumerable litigations concerning the transmission of (ritual, economic and political) charges and rights within *sampradayas*, as well as the development of a legal discourse about what the proper behavior and morals of ascetics should be in these religious orders. In Chapter 6, Voix investigates the famous ‘Tandava case’ that opposed Ananda Marga, a controversial tantric group, and Kolkata’s Commissioner of Police at the beginning of the 1980s. The issue at stake was Ananda Marga’s right to perform in public a dance ritual that involved the use of skulls and knives, a demonstration that for the Commissioner of Police was contrary to public order and morality. In its final judgment on the matter (2004),<sup>37</sup> the Supreme Court of India rejected Ananda Marga’s petition, considering that it was not an ‘essential religious practice’ and thus was not protected by the Constitution. However, as the author argues, the long legal process that led to that decision had a decisive impact on the movement’s own religious identity as well as on its perception by the general public. By analyzing the tactical ploy used by both parties to defend their view, as well as the courts’ judgments, the author shows not only how Indian courts contribute to reforming contemporary Hinduism but also how religious groups

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<sup>36</sup> Compare Breckenridge (1977: 103), writing about the colonial period: ‘the judge was creating, and not sustaining, custom and usage.’

<sup>37</sup> *Commissioner of Police and Others v. Acharya Jagadishwarananda Avadhuta and Another*, 2004 (2) CTC 690; JT 2004 (3) SC 224; (2004) 3 MLJ 28 (SC); 2004 (3) SCALE 146; (2004) 12 SCC 770.

integrate a judicial rationale in their own tradition. By declaring in 1983 that Ananda Marga ‘belonged to the Hindu religion’ and by ascribing it the status of a religious denomination, the Supreme Court contributed to changing the group’s self-image as well as its public one. Whereas in the 1970s Ananda Marga had been considered a politico-religious movement whose activists were prone to violence, /p. xxxvi/ the Tandava case gave the group the legitimacy of a recognized religion. Furthermore, the court’s close examination of Ananda Marga’s scriptures, which led to the decision, was instrumental in changing the significance the group attributed to the texts: although only oral teachings by the guru were mandatory, a text—the *caryācarya*—, which until then had had little or no authority within the group, became a central element.

In Chapter 7, Bhattacharya evokes the trial of the head (*mahant*) of the Tarakesvar monastery in Bengal, held at the end of the nineteenth century, in which he was accused of seducing a young married Brahmin woman. Bhattacharya examines in detail the arguments put forward by British judges and underlines two dimensions: one is that the judges bore in mind a Western-monastic model of asceticism, which did not correspond to the reality of some ascetics (in this particular case, *Giris*) in India. Their view met with the approval of the public because mahants were commonly criticized for their supposed wealth and sensuality; such perceptions also fuelled reformist attempts to ‘purify’ Hinduism. The judges developed a second type of argument, equally supported by the public, about the proper behaviour a woman had to abide by according to a few chosen normative texts. As Bhattacharya shows, this example is a good illustration of the similarities and the interplay between the personal and legal views of the British elite, and of the impact of Hindu reformist movements on the population, converging in the condemnation of the ‘lustful’ mahant and in discoursing on women’s proper morality. As an epilogue, a court decided in the 1920s that the function of mahant at Tarakeswar was to be placed under the authority of a managing committee. By 1937, with the court’s approval, this committee had changed the rule of succession to this office. Within a dozen years or so the courts had thus completely redefined the charge of mahant in all its aspects: managing rights, transmission of the office, and moral and religious behaviour (see also Kasturi 2009).

These changes met with the approval of an important faction within the Hindu reformist and political elite. As Kasturi demonstrates (Chapter 8), the movement for independence was sharply divided on the issue of sampradayas. In the United Provinces, Hindu populist campaigns castigated ‘profligate’ mahants and asked for /p. xxxvii/ monasteries to be considered as public institutions and to be controlled by the state in the interest of devotees. These views, which were notably defended by the Hindu Mahasabha who regarded the autonomy of sampradayas as a divisive factor within Hinduism, were disputed by orthodox Hindus for whom sampradayas were ‘different religions’ and had to retain their distinct management rights. This conflict of interest was most explicit when, in 1925, a Religious and Charitable Endowments Committee was set up in the United Provinces to draft a bill for the legal supervision of religious endowments, including monasteries. As Kasturi underlines, ‘two starkly diverging opinions’ were submitted in the final report. The ‘majority’ opinion supported the orthodox view that monasteries and sectarian associations be excluded from the proposed legislation, while the ‘minority’ opinion rejected this stand as maintaining divisions and peculiarities that would foster disunity amongst Hindus. For them, the administrative autonomy of sampradayas and the exclusion of monasteries from being considered public trusts constituted ‘a denial that Hinduism constituted a coherent religion and “nation.”’ The rationalization of the management of endowments as pursued by British rule therefore went hand in hand with an ideal of building a strong Hindu nation, which was advocated by the Mahasabha as opposed to more orthodox streams of Hinduism.

The contribution by Clémentin-Ojha (Chapter 9) is a further instance of the courts' intervention in the definition of a religious function, in this case that of *shebait*, 'custodian' of a deity. The series of cases reviewed concerns Govinda Deva, a god that is conceived as self-manifested in his idol. This god is worshipped at a Jaipur temple and his custodian belongs to the Gosvami order. Hindu idols are recognized as having a juristic personality: in 1964 the Supreme Court ruled that the god was the sole owner of the temple.<sup>38</sup> As the latter was not the private property of the shebait, it had to be regarded as a public trust. Another judgment analysed by Clémentin-Ojha was passed in 1968<sup>39</sup> and ended a 10-year appeal in a conflict between /p. xxxviii/ the shebait and another member of his family: the latter managed a temple and its associated properties in Vrindavan, where a replica of the idol of Govinda Deva was worshipped. The District Court of Allahabad decided that the replica could not be legally distinguished from the main idol, which was the only one to have a juristic personality; therefore, the shebait in Jaipur was the only one entitled to manage the God's properties in Vrindavan. Interestingly, the legal line of argument the judge followed to confer exclusive religious rights on the shebait overlooked part of the tradition which was related to his religious legitimacy through initiation, and referred only to the rule of succession by primogeniture. As Clémentin-Ojha points out, this meant conferring religious rights on non-religious grounds. This might indeed have been part of the secularization process, forbidding the judge to refer to 'pupillary qualification' since it was a religious not legal category. In fact, this seems to characterize the use of law in other cases discussed in this volume, when law is used to obtain something in the name of something else—see Section IV in particular. As far as Govinda Deva was concerned, this was not the first time this logic had been applied: in 1945, the Kachchvāhā kingdom, where the god resided, had proceeded in much the same way. The current legal intervention of the state, with its 'secularism', also has to be examined from a historical perspective and is part of a long-term process.

Section IV, 'Personal Law: Twists and Turns', elaborates on legal and judicial strategies. Halpérin (Chapter 10) discusses recent case law regarding mixed marriages registered under the Hindu Marriage Act. Some decisions herald a shift to a more secularized marriage, considered more of a contract than a sacrament; however, especially since 2008, other decisions have reaffirmed the sacramental nature of Hindu marriage and have stressed the necessity for both spouses to be Hindu at the time of marriage, with solid proof of their conversion if one of them was born into a different religion. Some judges have denounced faked conversions at the time of marriage in order to 'manoeuvre the law'. Such change, according to Halpérin, does not necessarily have to be ascribed to the direct influence of Hindutva. Most judges defend explicit secular views and aim at modernizing the law. Leaving aside the possibility that some judges may wish to develop the 'Special marriage' option for mixed couples, thus discouraging /p. xxxix/ recourse to a Hindu wedding in such situations, Halpérin suggests that what may appear to be a return to the black letter of the law and a move towards more religiously oriented decisions may in fact be a tactical move to avoid criticism by Hindu traditionalists regarding other sensitive cases—such as inter-caste and inter-religious marriages, or the '*sagotra* marriage' within a caste, which some violently oppose. From this particular perspective, the religious flavour of some recent decisions can be seen as a concession that is made in view of furthering a higher agenda of eliminating caste discrimination and of promoting free choice marriages.

The volume concludes with a contribution by Basu (Chapter 11) who discusses the differences in personal law codes, both Hindu and Muslim, which open up various

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<sup>38</sup> *Idol of Thakurji Shri Govind Deoji v. Board of Revenue, Rajasthan*, AIR 1965 SC 906: [1965] 1 SCR 96.

<sup>39</sup> *Thakur Govind Deoji Maharaj v. Sudha Chandra and Others*, first appeal No. 280 dated 1958, Court of the 1st Additional District Judge, Allahabad.

possibilities in terms of legal strategy.<sup>40</sup> Her courtroom ethnography in West Bengal shows how litigants and lawyers frame their claims by taking into account the differences between these codes and the legal opportunities they offer, even though similar fundamental issues—the economic rights of women in marriage—are at stake. Adultery or polygyny - the latter frequently denounced as a Muslim ‘privilege’ according to an emotional and rather ambiguous stereotype - appears to be essentially linked to women’s access to economic resources. In their routine decisions judges make little reference to religious issues. A comparison with a court in Bangladesh where Muslim personal law was reformed so that polygyny or bigamy became a criminal offense (unless existing wives give their written consent) shows that Muslim women secure better economic settlements there than Hindu women. As Basu concludes, ‘it is not the doctrinal elements of any one religion, but rather the legal provisions through which they are framed, that determine the capacity for providing economic entitlements and freedom from violence.’

A similar observation about how economic issues and religious affairs become entangled might also be made for other cases presented here (Tarabout, Chapter 1; Letizia, Chapter 2; Hüsken, Chapter 5; Bhattacharya, Chapter 7; Kasturi, Chapter 8; Clémentin-Ojha, chapter 9). In personal law, or where religious rights or **/p. xl/** the management of endowments are concerned, courts may radically alter economic redistribution when deciding on what constitutes ‘essential’ religious practices, or when they legally formulate religious ‘traditions’. Contrary to the idea of irredeemable heterogeneity between secularism, as enforced by the courts, and the ascribed ‘cultural’ characteristics of society, the general picture that emerges is one of complete integration, both in the state’s governing apparatus (though there may be some tension between the courts and other state agencies) and in social and political practices and strategies. Widespread recourse by some judges to philosophical and religious arguments taken from a modern reading of Sanskrit texts, and the convergence of their aim of establishing a reformed Hinduism with that of Hindu nationalists, suggests a deep interpenetration of the legal and the religious. While the political use of religion is regularly denounced, the judicialization of religion is less often the focus of attention because the legal system is self-constructed as an autonomous ‘field’ (Bourdieu 1987) set apart from political (and, here, religious) issues. Besides, one may well also wonder about a possible ‘religionization’ of the courts (as denounced for instance by Nanda 2007 about the state and the public sphere), though the present contributions suggest a more diverse and nuanced reality.

Judges are not all-powerful. They also hold diverse personal views. This volume does not contend that the judiciary, by itself, transforms society and religion, nor that it follows some kind of linear path. Nevertheless, the courts are crucial actors in the considerable transformations that religions have undergone in South Asian societies over the last few centuries. Not only are they crucial sites for the expression of conflicting claims and values: they provide renewed tools and possibilities for the legal expression of these conflicts. In doing this, they frame a legal landscape that is both a reflection of social and political aspirations and changes, and the result of the judges’ own engagement in the articulation of political and religious interests in South Asia today.

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<sup>40</sup> These codes are the product of a late colonial construction by Hindu and Muslim (male) reformers who imposed their own gendered bias, cf. Newbiggin (2009).



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